IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-235

E. ALVEY WRIGHT, DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

STOP H-3 ASSOCIATION, a Hawaiian non-profit corporation, MOANALUA VALLEY COMMUNITY ASSOCIATION, a Hawaiian non-profit corporation, and HAIKU VILLAGE COMMUNITY ASSOCIATION, a Hawaiian non-profit corporation, for themselves and on behalf of their members; FRANCES M. DAMON, HARRIET DAMON BALDWIN, HELEN HOPKINS, KENT MILLER, JOHN MANNING, HAROLD FUJIWARA and VIRGINIA BROOKS, for themselves and on behalf of all other persons similarly situated; MOANALUA GARDENS FOUNDATION; HUI MALAMA AINA O KO'OLAU; LUCY S. NALUAI; OLIVIA PADEKEN; LEROY CHUNG; RANDY KALAHIKI; PHOEBE KAWELO; ROXANNE VELARDE; WILLIAM T. COLEMAN, JR., individually and as Secretary of the United States Department of Transportation; and RALPH SEGAWA, individually and as Hawaii Division Engineer, Federal Highway Administration,

Respondents.

STATE OF WASHINGTON,

Amicus Curiae,

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE & BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF ISSUANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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STATE OF WASHINGTON,
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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Comes now the State of Washington, acting by and through its Attorney General, Slade Gorton, and Assistant Attorneys General, Thomas R.

Garlington and Charles F. Secrest, and hereby request this court to grant permission for the State of Washington to file the attached Brief of Amicus Curiae in Support of the Petition for Writ of Certiorari in the above entitled cause for the following reasons:

1. Since Supreme Court Rule 42, 28 U.S.C.A. provides that it is unnecessary to obtain the consent of the parties to the filing of an *amicus curiae* brief submitted by a State sponsored by its Attorney General, this motion would not ordinarily be made. However, in the instant case, the Clerk's Office requested that this motion be made in light of the status of this case.

2. Supreme Court Rule 42, 28 U.S.C.A. provides that briefs of *amicus curiae* be submitted a reasonable time prior to the consideration of a petition for writ of certiorari. Since the Petition for Writ of Certiorari in the instant case has not yet been considered by the court, nor have all of the briefs of the parties yet been submitted and circulated, it is respectfully submitted that this brief is timely within the requirements of Rule 42. The reason the brief was not submitted earlier was that amicus was unaware that there were proceedings pending in this court until after the Petition for Writ of Certiorari had already been filed. Amicus has proceeded as expeditiously as possible to prepare and submit the attached brief after it obtained knowledge of the pendency of these proceedings.

For the foregoing reasons, the State of Washington respectfully requests that its motion be granted.

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THOMAS R. GARLINGTON,
Assistant Attorney General
CHARLES F. SECREST,
Assistant Attorney General
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BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF ISSUANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The applicable statutes and decisions involved in this case are set forth in the Petition for a Writ of Certiorari filed by the Director of the Hawaii Department of Transportation and will not be repeated here.

QUESTIONS PRESENTED

The petitioner, Director of the Hawaii Department of Transportation, has presented two ques-

tions for this court to review, stated as follows:

> The provisions of Section 4(f) of the Department of Transportation Act of 1966 and Section 18 of the Federal-Aid Highway Act of 1968 impose certain conditions on the approval of any highway program which "requires the use of * * * any land from a historic site of national, state, or local significance as so determined by" "the federal, state, or local officials having jurisdiction thereof." The questions presented in this litigation are:
>
> 1. Whether these statutory provisions apply to a privately-owned alleged "historic site" determined to be of no state or local significance by the State of Hawaii officials having jurisdiction over the site, and of no national significance by the Interior Department, by virtue of a determination by the Interior Department that the site is of *local* significance?
>
> 2. Whether these statutory provisions apply to a petroglyph rock, which is not a "site" at all, which had previously been moved from its original location, and which will be fully protected in its present position by an agreement characterized by the Advisory Council on Historic Preservation to be satisfactory for this purpose?

(Petition 2-3)

The State of Washington supports the petition for a Writ of Certiorari in the above entitled case and concurs with the position of the petitioner. The primary challenge by petitioner is directed to the applicability of Section 4(f), *supra*, to the Moanalua Valley on the Island of Oahu, Hawaii. The State of Washington's primary concern is with the portion of the Court of Appeals' decision which ap-

plied Section 4(f) to the petroglyph rock, Pohaku ka Luahine. As we will subsequently discuss, the court's resolution of that issue creates legal principles having a detrimental impact throughout the Ninth Circuit. In support of that contention, we submit that the second issue raised in Hawaii's petion (quoted above) includes the following questions:

> (a) When neither the Secretary of Transportation nor the United States District Court has found that a proposed highway to be located *near* a protected site under Section 4(f) constitutes a "use" under that section, can an appellate court nevertheless make a "*de novo*" determination that a "use" will occur?
>
> (b) Whether the appropriate standard on which to base a finding that Section 4(f) applies to a project is that of injury in fact to the lands in question?

STATEMENT OF INTEREST OF AMICUS CURIAE STATE OF WASHINGTON

The specific portion of the decision below which is the subject of amicus' interest was stated by the two-judge majority as follows:

> After careful consideration, we cannot escape the conclusion that Pohaku ka Luahine, and its immediate environs, qualify for protection under section 4(f). It is clear that the rock was originally located in the Valley, and it is inseparably linked to historic events that there occurred long since. Consequently, so long as the

> rock remains in the Valley, even though it may stand a few feet from its original location, we believe that it forms the basis for an historic site. *Further, we believe that H-3, which will pass near the rock, will "use" land from that historic site. See Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972) (a proposed highway that would encircle a public campground would "use" that campground).

(Emphasis added 533 F.2d 434, 445)

By contrast, Judge Wallace in his dissent said:

> The appellants alleged that H-3 would use the rock but the trial court made no findings on the issue and the point has not been argued during this appeal. *Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972), requires a broad construction of the word "use" so as to require section 4(f) statements wherever there is a substantial question of adverse impact. * * *
>
> * * * Although we have held that the determination of "use" of a site by a highway is a question of law and not fact, *Brooks v. Volpe, supra*, 460 F.2d at 1194, we cannot resolve the legal issue in the absence of evidence and findings on the effect of the highway on the rock.

The statute before the court was Section 4(f) of the Department of Transportation Act of 1966, as amended, 82 Stat. 824, 49 U.S.C. § 1653(f), and Section 18 of the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U.S.C. § 138 (hereinafter referred to as Section 4(f), which provide in pertinent part as follows:

* * *

> After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl

> refuge of national, State or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

This court has held that, once it is found that a project "uses" lands protected by Section 4(f), the Secretary of Transportation has only a small range of choices available to him if he is to approve the project; he may do so only if there are no feasible alternative routes or if a feasible alternative route involves uniquely difficult problems such as extraordinary costs or community disruption. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971).

The majority opinion in the instant case expanded the rule expressed in *Brooks v. Volpe*, 460 F.2d 1193 (9th Cir. 1972), that the determination of "use" is one of law to be decided by the appellate court without the necessity of findings of fact either by the Secretary of Transportation or the district court. Amicus submits that this Ninth Circuit rule applied in this case conflicts with (1) the principles of judicial review announced by this court in *Citizens to Preserve Overton Park v. Volpe*, *supra*, and (2) the rule adopted by the Eighth Circuit Court of Appeals in *ACORN v. Brinegar*, 368 F. Supp. 685 (E.D. Ark. 1975), *aff'd* 531 F.2d 864 (8th Cir. 1976).

In *Overton*, *supra*, this court provided a three-step inquiry in the judicial review of the Secretary's determination: (1) Did the Secretary act within the scope of his authority? (2) Was the decision made by the Secretary arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law within the provisions of 5 U.S.C. § 706(2)(A)? and (3) Did the Secretary follow the correct procedure in arriving at his decision? This court expressly held that the reviewing court was not to undertake a *de novo* review.

In *ACORN v. Brinegar*, *supra*, the Eighth Circuit adopted a similar rule to be applied in determining whether a highway to be located adjacent to a park constitutes a "use" of the park. Although phrased in different terms, the Eighth Circuit rule can be reconciled with the decision in *Overton*, *supra*, as will be detailed in the following argument.

It is the position of amicus that the determination of whether a proposed highway will "use" a 4(f) property (where there is no physical taking) is to be determined initially by the Secretary based upon the administrative record before him. Judicial review of his determination should be precisely as set forth in *Overton* for the review of a determination by the Secretary as to whether a feasible or prudent alternative exists to the use of a 4(f) property.

The potential for unforeseen federal intervention in the process of locating streets and highways which will exist because of the Ninth Circuit rule is well illustrated by the instant case. There are innumerable small parks, roadside campgrounds, recreation areas, and historic sites, the location of which has been based essentially upon highway access. Federal-aid funds now participate in the cost of a broad array of highway facilities—from the interstate highway to a city or county arterial street. 23 U.S.C. § 103. If mere proximity to any park, recreational, or historic site creates the risk that an appellate court may ultimately find that there is a "use" of the site requiring a relocation unless the "feasible or prudent" standard can be met, state and municipal transportation planners are placed in an untenable position. On the one hand they are required to meet the local or regional transportation needs balanced against possible environmental damage—all developed through lengthy community planning processes. Yet a determination which has carefully balanced both transportation needs and environmental considerations—and most importantly reflects community desires—may be set aside by application of the comparatively inflexible dictates of Section 4(f) by virtue of the *proximity* of the highway or street to a 4(f) site. A predictably anomalous result of such a rule is illustrated by the instant case where, as the dissenting judge noted, the value of the petroglyph rock as an historic place may in-

deed be based upon its easy accessibility to the highway.

The uncertainty of the application of Section 4(f) to highway projects is the basis of the State of Washington's interest in the instant case. Since a number of major highway projects in the State of Washington have involved litigation of a Section 4(f) question, the interest of amicus is indeed very real and substantial.[1] Indeed, there have been two specific instances where the rule adopted by the court below has been applied to highway projects in the State of Washington.

The initial application of the Ninth Circuit's interpretation of the term "use" in Section 4(f) antedates the decision here in question and involved over four years of litigation, direct costs of approximately $2 million, and indirect costs from inflation for a two-year period while a major interstate project was delayed during the preparation of a 4(f) statement. See *Brooks v. Volpe*, 319 F. Supp. 90 (W. D. Wash. 1970), *reversed* 460 F.2d 1193 (9th Cir. 1972); *on remand Brooks v. Volpe*, 350 F. Supp. 269 (W. D. Wash. 1972), *aff'd* 487 F.2d 1344 (9th Cir. 1974); *on remand Brooks v. Volpe*, 380 F. Supp. 1102 (W. D. Wash. 1974); *aff'd sub nom Brooks v. Coleman*, 518 F.2d 17 (9th Cir. 1975).

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[1]Specifically: The section of I-90 between the cities of Mercer Island and Seattle, *see Lathan v. Volpe*, 350 F. Supp. 262 (W.D. Wash. 1972), *aff'd sub nom Lathan v. Brinegar*, 506 F.2d 677 (9th Cir. 1974); the section of I-90 near the Town of North Bend, Washington, *see Daly v. Volpe*, 326 F. Supp. 868 (W.D. Wash. 1972); the section of I-90 at Snoqualmie Summit, *Brooks v. Volpe, supra*, the section of I-82 between Yakima and Prosser, *see Lange v. Brinegar*, ... F. Supp. ..... (E.D. Wash. Aug. 31, 1976).

The second specific application of the Ninth Circuit Court of Appeals' definition of "use" was to the 47-mile I-82 project between the cities of Yakima and Prosser, Washington. In the case of *Lange v. Brinegar*, ... F. Supp. ..... (E. D. Wash. Civil No. 3941, Aug. 31, 1976), the District Court for the Eastern District of Washington, relying on the decisions of the Ninth Circuit Court of Appeals in *Brooks v. Volpe* and the instant case, found that the I-82 project would "use" certain streamside and access easements owned by the Washington State Department of Game and ordered the Secretary of Transportation to make the findings required by Section 4(f). In so holding, the court noted that there was a "use" of the 4(f) lands in question within the meaning of the Ninth Circuit's definition even though no land from the easements was to be physically taken for the project because of certain *possible* adverse environmental impacts on the easements resulting from the highway project.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

A. The Ninth Circuit Court of Appeals Applied an Inappropriate Standard of Review in Determining That the Proximity of the H-3 Freeway to the Rock Constituted a Use Within the Meaning of Section 4(f)

As was noted in both the decision of the District Court and in the decision of the two-judge

majority of the Ninth Circuit panel on appeal, the Secretary of Transportation made a determination that Section 4(f) did not apply to the petroglyph rock, at least in part, because the project would not "use" the rock.

On appeal, the two-judge majority of the Ninth Circuit panel apparently disagreed with the Secretary since they held that they *believed* that H-3 would use land from the historic site on which the petroglyph rock was located because the highway passed near the rock. The majority did not find that the Secretary had misinterpreted the scope of his authority under Section 4(f), nor that the Secretary had failed to follow the procedures required by law, nor that the Secretary's determination was arbitrary, capricious, or an abuse of discretion. In substance, the determination of the Court of Appeals in the decision below regarding the "use" of the petroglyph rock was a *de novo*[2] finding by the appellate court that a "use" existed.

The Secretary's conclusion that Section 4(f) did not apply to the petroglyph rock since it was not "used" by the H-3 highway project was administrative record. The trial court expressly found:

> * * * that the discussions in the EIS of the impact of the highway on properties pos-

[2]In this connection, we wish to emphasize that the Ninth Circuit Court of Appeals reversed the finding of the trial court in *Brooks v. Volpe, supra*, that there was no "use" of the Denny Creek Campground, and, as discussed *infra*, that the Secretary of Transportation had found that Section 4(f) did not apply to the petroglyph rock in the instant case because it was not "used" by the project. In both cases the Ninth Circuit Court of Appeals determined there was a "use" notwithstanding the earlier judicial and administrative determinations.

sessing historical, architectural, archeological, or cultural value located within the area of the undertaking's potential environmental impact, *especially with respect to the petroglyph rock Pohaku ka Luahine* and to Moanalua Valley, were adequate when submitted *both for purposes of NEPA and for purposes of a 4(f) statement.*

(Emphasis added 389 F. Supp. 1102, 1110)

The failure of the majority of the court to confine its review within the bounds of 5 U.S.C. § 701 et seq. in the face of the Secretary's determination that Section 4(f) did not apply, which determination was based upon an adequate administrative record, is in direct conflict with the standard of judicial review mandated by this court in *Overton.*

B. The Decision Below is in Direct Conflict With the Decision of the Eighth Circuit Court of Appeals in *ACORN v. Brinegar*, 368 F. Supp. 685 (E. D. Ark. 1975), Affirmed on Basis of Opinion Below, 531 F.2d 864 (8th Cir. 1976)

Not only did the majority of the court below apply an inappropriate standard of review in determining that there was a "use" of the petroglyph rock, the rule of law applied by the court is diametrically opposed to the rule of law adopted by the Eighth Circuit Court of Appeals in *ACORN v. Brinegar, supra.* The rule of law which the two-judge majority of the Ninth Circuit Court of Appeals' panel applied in the instant case was originally announced in *Brooks v. Volpe, supra,* aptly

stated by the dissenting judge, that a "use" will be found "so as to require a Section 4(f) statement *wherever there is a substantial question of adverse impact.*" In contrast, the courts in *ACORN, supra,* held that the construction of a highway adjacent or near to a public park would not be held to be a constructive "use" in the absence of a showing by a preponderance of the evidence that there was an adverse environmental impact on the park in question. The Ninth Circuit Court of Appeals apparently will presume that a "use" exists whenever a freeway is located "near" property protected by Section 4(f); whereas, the Eighth Circuit Court of Appeals would require a showing of injury in fact before a constructive use would be found.

The rule of the Eighth Circuit Court of Appeals can be reconciled with this court's decision in *Overton, supra,* and applied to the judicial review of a 4(f) decision of the Secretary of Transportation pursuant to 5 U.S.C. § 706(2) (A-D). In *ACORN, supra,* there apparently was no decision of the Secretary of Transportation regarding the applicability of Section 4(f) for the court to review. The trial court was therefore forced to make a *de novo* determination of whether there was a constructive "use" based on evidence presented at trial. This was affirmed by the Eighth Circuit Court of Appeals since there was evidence to support the trial judge's conclusion. On the other hand, the Ninth Circuit Court of Appeals would give no weight

to either the decision of the Secretary of Transportation or the decision of the trial court regarding the applicability of Section 4(f) to a given highway project.

The rule adopted by the Ninth Circuit Court of Appeals is both inappropriate and unworkable. Adverse environmental impacts such as deterioration in air quality and increases in noise levels are capable of being measured by commonly accepted methods of prediction and their relative impacts capable of being quantified by reference to standards which have been promulgated and published. *See* 40 C.F.R., Part 50; 23 C.F.R. § 772. While an aesthetic impact may be difficult to quantify, it is possible to describe the physical features of the project which may be observed from the 4(f) land in question, including landscaping or other screening features to minimize the aesthetic impact of the project. If Section 4(f) is to be applied as a rational policy to enhance and protect recreational and historic sites in terms of the public's actual enjoyment of these resources, their accessibility by way of improved streets or highways should be given appropriate weight in determining whether there will be an injury in fact, and if there is such injury, then there is a constructive use of the site.

Furthermore, the specific information, as it refers to the project, is generally available to the public and reviewing agencies through the discussions contained in an environmental impact statement. *See* 23 C.F.R. § 771.18-.20. In fact, as noted above,

the specific information concerning potential adverse environmental impacts on the petroglyph rock was available to the court for review in the instant case.

The test of injury in fact is the only workable rule. As applied, the rule of the Ninth Circuit Court of Appeals presents a problem to the transportation planner which is virtually impossible to administer. It is clear that the applicability of Section 4(f) to a project is the key element in the transportation planning process. Under the rule adopted by the Ninth Circuit Court of Appeals the transportation planner can never be certain whether Section 4(f) applies until the "substantial question of adverse environmental impact" has been answered in the minds of the appellate court. On the other hand, the rule of the Eighth Circuit Court of Appeals which requires a showing of injury in fact to bring the provisions of Section 4(f) into play is one capable of determination by the transportation planner at an early stage of the planning process.

CONCLUSION

For the foregoing reasons the Writ of Certiorari should be issued.

Respectfully submitted,

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